

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000118-MR

LARRY MCINTOSH AND
LYNN MCINTOSH

APPELLANTS

v.

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 05-CI-00406

OLDHAM COUNTY BOARD OF EDUCATION

APPELLEE

OPINION AFFIRMING

** ** *

BEFORE: HOWARD,¹ NICKELL, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Larry McIntosh and Lynn McIntosh (collectively referred to as the McIntoshes) bring this appeal from a January 10, 2007, summary judgment of the Oldham Circuit Court in favor of Oldham County Board of Education (Board) and

¹ Judge Howard concurred in this opinion prior to Judge Michael Caperton being sworn in on December 7, 2007 as Judge of the Third Appellate District, Division 1. Release of this opinion was delayed by administrative handling.

awarding the McIntoshes \$1,931.00, plus interest, for the taking by eminent domain of a permanent easement upon their property. We affirm.

In 1998, the Board selected a site for constructing a new elementary school, middle school, and high school in Oldham county. This site was bordered along the north side by Kentucky Highway 22. In order to obtain approval for its site plan from the Kentucky Highway Department (Department), the Department required the Board to construct turn lanes near the entrance to Highway 22. The construction of the turn lanes required the Board to condemn permanent easements from ten abutting property owners, including the McIntoshes. The easement sought upon the McIntoshes' property was comprised of a 20 foot by 105 foot strip of land.

Based upon a previously obtained appraisal, the Board offered the McIntoshes \$1,700.00 for the condemned permanent easement. Kentucky Revised Statutes (KRS) 416.550. The McIntoshes rejected the offer, and the Board subsequently filed a condemnation action against the McIntoshes. Pursuant to KRS 416.580, the circuit court appointed three commissioners to value the subject property. The commissioners' report determined that the difference in the fair market value of the McIntoshes' property before the taking and the fair market value of the property after the taking was \$1,931.00. By interlocutory judgment, the circuit court found that the Board had the right to condemn the permanent easement upon the McIntoshes' property and awarded \$1,931.00 in compensation for the taking. KRS 416.610.

The McIntoshes filed exceptions to the interlocutory judgment and challenged the amount of compensation awarded as inadequate. KRS 416.620(1). Therein, the McIntoshes also requested a jury trial upon the issue of compensation.

The McIntoshes intended to testify at trial and give opinions concerning the difference between the fair market value of their property before the taking and the fair market value of their property after the taking.² The Board subsequently obtained written discovery and depositions from the McIntoshes regarding their qualification to testify as to the fair market value of their property before and after the taking. Thereafter, the Board filed a motion in *limine* to exclude the McIntoshes' testimony as to the fair market value of the property and also filed a motion for summary judgment.

On January 10, 2007, an order was entered granting the Board's motion in *limine* to exclude the McIntoshes' testimony and granting the motion for summary judgment. The court determined that the McIntoshes were not qualified to give their opinions concerning the before and after fair market value of the property. The court also noted that the McIntoshes had no other evidence concerning the before and after fair market value of their property. As such, the court entered summary judgment in favor the Board and awarded the McIntoshes \$1,931.00 plus interest (representing the commissioners' award.) This appeal follows.

The McIntoshes contend the circuit court erroneously entered summary judgment and that they were improperly denied the “statutory right to a jury trial”

² Based upon review of the record on appeal, Larry McIntosh and Lynn McIntosh did not retain any licensed real estate appraiser or other expert witness to testify on their behalf.

available to landowners in a condemnation action under KRS 416.620. Moreover, the McIntoshes believe they were qualified to express opinions upon the before and after fair market value of their property and that the circuit court committed reversible error by deciding otherwise.

Summary judgment is proper where there exist no material issues of fact and movant is entitled to judgment as a matter of law. Ky. R. Civ. P. 56; *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). For the reasons hereafter stated, we think the circuit court properly entered summary judgment.

KRS 416.620(1) plainly provides that “[a]ll questions of fact pertaining to the amount of compensation to the owner, or owners, shall be determined by a jury” Under this statute, a landowner of condemned property is clearly entitled to a jury trial upon “questions of fact” as to the proper amount of compensation. Thus, to be entitled to a jury trial, there must exist a justiciable question of fact as to the proper amount of compensation for the jury to decide. In order for the McIntoshes to be entitled to a jury trial, it was incumbent upon them to have presented sufficient probative evidence to create an issue of fact upon the proper amount of compensation.

In granting summary judgment, the circuit court concluded that the McIntoshes failed to offer any evidence upon the before and after fair market value of the property:

This Court is aware that the McIntoshes will not have any expert testify for them with regard to their damages. They will not have any appraisal of their property to determine the “before taking” and “after taking” fair market values. They

have communication with no one concerning the fair market value of the right-of-way easement subject matter of this action. The McIntoshes inform this Court that they intend to testify themselves as to their damages.

. . . .

Under the rule set forth in Slusher, in order to present testimony regarding the the value of property, one must first qualify under all three of the Kentucky prerequisites. To be qualified to testify as to property values, the landowners must be acquainted with property values in the vicinity, must also know the property to be valued, and must understand the standard of value. According to Mr. McIntosh's [sic] deposition testimony, he is unaware of the difference between a permanent easement and a fee simple taking. Further, he has stated that he also does not know the standard for damages in a condemnation action. In light of the Slusher requirements and based on the McIntosh's [sic] testimony, the Respondents here cannot establish the requisite qualifications, as landowners, to give their opinion of fair market value. If this action were to proceed to trial, the jury would be forced to speculate on testimony with regard to fee simple values without testimony as to the value of a permanent easement.

Conversely, the McIntoshes maintained that they were qualified to express an opinion upon the before and after fair market value of the property; thus, they argue that their testimony created an issue of fact upon the proper amount of compensation for the jury to decide.

In this Commonwealth, an owner of real property is not “presumed” to be qualified to render an opinion as to the market value of that property. *Com. v. Fister*, 373 S.W.2d 720 (Ky. 1963). Rather, a witness, including the owner of land, may be qualified to give an opinion as to the market value of real property. *Com. v. Slusher*, 371 S.W.2d 851 (Ky. 1963). To be so qualified, a lay witness must “know the property to be valued

and the value of the property in the vicinity, must understand the standard of value, and must be possessed of the ability to make a reasonable inference.” *Id.* at 853. The issue of a witness's qualification to testify is a question for the court to determine. *Com. v. Tyree*, 365 S.W.2d 472 (Ky. 1963).

In determining that the McIntoshes were not qualified to express their opinions upon fair market value, the circuit court specifically cited to Larry's deposition testimony. Therein, Larry was specifically asked if he knew the measurement of damages in a condemnation case? His reply was “no.” He was also questioned about whether he possessed any independent knowledge of property values in the area? Again, he replied “no.” In Lynn's deposition testimony, it was apparent that she was unaware of whether the Board was taking a permanent easement or fee simple title.

The McIntoshes attempted to cure their deposition testimony deficiencies by filing affidavits in response to the motion for summary judgment. As a general proposition, a deposition is more reliable than an affidavit. *Lipsteuer v. CSX Transportation, Inc.*, 37 S.W.3d 732 (Ky. 2000). However, affidavits may not be ignored if the affidavit explains the inconsistency between the deposition and the affidavit. *Id.* In this case, the affidavit did not explain the prior inconsistencies and was nothing more than a self-serving statement attempting to create an issue of fact. Under this circumstance, the circuit court correctly disregarded the affidavits.

Viewing the record as a whole, we do not believe that the McIntoshes adequately understood the value of property in the area, the proper standard of value in a

condemnation action, or the extent of the property taken. As such, we conclude that the McIntoshes were not qualified to express an opinion upon the before and after fair market value of the property. Accordingly, we hold that the McIntoshes failed to present evidence creating an issue of fact as to proper compensation; thus, the circuit court properly entered summary judgment in the amount of the commissioners' award, \$1,931.00.

For the foregoing reasons, the summary judgment of the Oldham Circuit Court is affirmed.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT
FOR APPELLANT:

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BRIEF AND ORAL ARGUMENT FOR
APPELLEE:

Alan N. Linker
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